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No. 89-754

In The

Supreme Court of the United States

October Term, 1989

RADIX GROUP INTERNATIONAL, INC.,

Petitioner,

-against-

McGRIFF TREADING COMPANY, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION THREE

GAIL A. REISMAN
(Counsel of Record)

KALISCH & FISHER
Attorneys for Respondent
McGriff Treading Company, Inc.
9606 Santa Monica Boulevard
Penthouse Suite
Beverly Hills, California 90210
(213) 274-6683

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Whether the federal constitutional guarantee of due process hamstrings state courts so that they may not enter defaults as an ultimate sanction after repeated abuse of court policies and processes.

(2) Whether the long-standing, universally accepted rule of attributing the acts of counsel to his or her client violates the federal guarantee of due process.

(3) Whether, once a default has been entered after due notice and an opportunity to be heard, the federal guarantee of due process prohibits *ex parte* prove-up procedures.

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Respondent McGriff Treading Company, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion rendered by the California Court of Appeal, Second Appellate District, Division Three in this case.

INTRODUCTION

This case fails to present a substantial federal issue for review.

After repeated obstructions by petitioner's counsel in discovery, the California Supreme Court dismissed petitioner's pleadings and entered its default on respondent's cross-complaint. Respondent then proved-up the amount of its damages following California default prove-up procedure. Not until its reply brief filed with the California Court of Appeal did petitioner even attempt to frame a federal constitutional issue. Indeed, there is no such issue worthy of this Court's consideration.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

RADIX'S PETITION IS PROCEDURALLY DEFECTIVE, AND SHOULD NOT BE CONSIDERED, FOR FAILURE TO COMPLY WITH UNITED STATES SUPREME COURT RULE 28(4)(c) AND 28 UNITED STATES CODE SECTION 2403(b).

The Petition filed by Radix Group International, Inc. ("Radix") calls into question the constitutionality of California's discovery statutes permitting the imposition of a terminating sanction (California Code of Civil Procedure Sections 2023(b) and 2031(k), at pages 3, 4 and 5 of the Petition) as well as California's default prove-up procedure (at page 17 of the Petition).

Rule 28(4)(c) of the Rules of the Supreme Court of the United States provides for special filing and service procedures where the constitutionality of any statute of a State is questioned, as follows:

"(c) In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U.S.C. Section 2403(b) may be applicable and shall be served upon the Attorney General of the State. In proceedings from any court of the United States as defined by 28 U.S.C. Section 451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U.S.C. Section 2403(b), has certified to the State Attorney General the fact that the constitutionality of such statute of the State was drawn in question".

28 *United States Code* Section 2403(b) reads as follows:

"(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

Nowhere in Radix's Petition is it recited that 28 *United States Code* Section 2403(b) is applicable, and the proof of service which accompanies Radix's Petition is devoid of any reference to the required service of a copy of its Petition upon the Attorney General of the State of

California. Therefore, Radix's Petition is procedurally defective and should not be considered.

II.

RADIX'S FEDERAL DUE PROCESS CLAIM IS AN AFTERTHOUGHT. THE ISSUE WAS NEVER RAISED IN THE TRIAL COURT NOR TIMELY RAISED IN THE COURT OF APPEAL. THE CALIFORNIA SUPREME COURT'S DENIAL OF REVIEW THEREFORE RESTS ON THE ADEQUATE STATE GROUND THAT THE SO-CALLED FEDERAL CONSTITUTIONAL ISSUE WAS NEVER PROPERLY RAISED.

Radix now contends that it was deprived of constitutional due process under the Fourteenth Amendment by the Trial Court. Aside from the frivolous nature of this contention (as addressed below), this issue was raised *for the first time* in Radix's *reply* brief on appeal. Under California procedure, a constitutional question must be raised at the earliest opportunity or it will be considered as waived. *Balboa Insurance Company v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010, 197 Cal.Rptr. 250. Arguments raised in the appellant's reply brief for the first time should not be considered, unless good reason has been shown for the appellant's failure to present them earlier. *Younger v. State of California* (1982) 137 Cal.App.3d 806, 813, 187 Cal.Rptr. 310; *Balboa Insurance Company v. Aguirre, supra,* at page 1010 of 149 Cal.App.3d. Under California Rule of Court 29(b), issues which could have been raised, but were not so raised, in appellant's *opening* brief are not preserved for presentation before this Court and may be disregarded.

The California Supreme Court's denial of review rests on the adequate state ground that Radix failed to

properly raise the federal constitutional issue. This Court therefore has no jurisdiction to review that determination. *Stembridge v. Georgia* (1952) 343 U.S. 541, 546-547 [dismissing certiorari as improvidently granted where federal constitutional issue first raised in petition for rehearing in intermediate court.]

III.

A LACK OF DUE PROCESS IS NOT IMPLICATED HERE: THE TRIAL COURT GAVE RADIX REPEATED OPPORTUNITIES TO BE HEARD PRIOR TO ENTRY OF THE TERMINATING SANCTION, WHICH WAS FINALLY IMPOSED BECAUSE "NO OTHER SANCTION WOULD BE ADEQUATE TO PROTECT McGRIFF'S RIGHTS."

Due process is served when a party is afforded the opportunity to be heard. Radix was represented by its long-time counsel, Michael Armenta ("Armenta"), during all phases of the proceedings and was provided with an opportunity to be heard on all occasions. The boundaries of due process are exceeded when a party chooses to act in flagrant violation of court procedures, established to protect the rights of all litigants; to disregard Radix's demands for a second, third or even fourth chance to be heard is not a denial of due process, but a proper exercise of the Trial Court's discretion not to tolerate further abuse.

It is abundantly clear from the record in this action that the Trial Court gave Radix every opportunity to be heard, to conduct discovery and to present its case over the two and one-half year life of this action, provided only that Radix abide by the established rules of procedure and fair play. Having failed to live-up to even the

most basic pre-trial standards of cooperation and forthrightness, Radix cannot now complain that, after much tolerance, the Trial Court entered its default. Indeed, prior to entering Radix's default, Radix was afforded repeated opportunities to be heard; Radix simply chose not to file timely opposition to McGriff's two motions to compel production of documents nor to appear at the hearings on December 2, 1987 and February 3, 1988. Instead, on the eve of each hearing, Radix chose to serve defective, incomplete responses to discovery in violation of the Trial Court's Orders. Radix has not argued, and indeed cannot argue, that the dismissal of its complaint and the entry of its default were not justified by its obstruction of discovery.

The failure of Radix to cooperate with the Trial Court and with counsel for McGriff Treading Company, Inc. ("McGriff"), and the insufficiency of any sanction other than dismissal, was duly noted in the Trial Court's February 3, 1988 Order. [Appendix D to the Petition at page 17a: "The terminating sanction motion is granted. The court finds that the wilfull failure without any justification to produce relevant documents has prejudiced defendant and cross-complainant. No other sanction will be adequate to protect McGriff's rights."]

IV.

THERE IS NO SUBSTANTIAL FEDERAL ISSUE PRESENTED. RADIX HAD NOTICE OF ITS POTENTIAL LIABILITY TO McGRIFF PRIOR TO ENTRY OF RADIX'S DEFAULT, INCLUDING LIABILITY FOR PUNITIVE DAMAGES.

The sworn declarations filed by McGriff at the default prove-up hearing showed out-of-pocket damages

in connection with Radix's wrongful detention of McGriff's goods to be at least $51,726.97. (CT 439:17-24; CT 440:1-2.)* The judgment awarded McGriff on its cross-complaint against Radix in the Trial Court is comprised of $29,000 compensatory damages, $40,000 punitive damages, and $136.50 in costs (plus post-judgment interest as provided by law). (CT 517.) In its Orders Re: Prove-up [Appendix "B" to the Petition at pages 13a-14a], the Trial Court referred to paragraph 15 of McGriff's cross-complaint (CT 21:23-28) and the prayer (CT 38:23-24; CT 39:20-21; CT 40:19-20), in stating:

> "The Court is satisfied that cross-defendant [Radix] was given notice of the potential damages in the sum of $29,000 could be imposed by reason of the conversion of the four containers. Accordingly, cross-complainant [McGriff] may only recover $29,000 in compensatory damage. Notice in the prayer is given of a request for at least $500,000 in punitive damages and after weighing the relevant factors, [the Court] imposes punitive damages in the sum of $40,000. The Court declines to add the prior sanctions awarded to the judgment." (CT 515:11-21.)

The punitive damage award to McGriff of $40,000 made by the Trial Court is fully supported by the sworn declarations attesting to Radix's wrongful conversion and retention of McGriff's goods. The Court of Appeal recognized that this award, just 1.3 times the compensatory damages, is the result of measured deliberation by the Trial Court after careful consideration of McGriff's substantial evidence. It is abundantly clear from the record that Radix had notice of its potential liability to McGriff

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*As used herein, the reference "CT ___:___" refers to the pertinent page and line in the Clerk's Transcript.

prior to entry of its default, including liability for punitive damages, from McGriff's cross-complaint; indeed, Radix answered said cross-complaint on April 29, 1986.

V.

CALIFORNIA LAW THAT PARTIES IN CIVIL CASES ARE BOUND BY THE ACTIONS OF THEIR VOLUNTARILY- RETAINED COUNSEL DOES NOT RAISE ANY SUBSTANTIAL FEDERAL DUE PROCESS ISSUES.

In *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 187 Cal.Rptr. 592, 654 P.2d 775, the California Supreme Court reaffirmed the general rule that an attorney's inexcusable neglect is chargeable to the client regardless of the client's knowledge of, or participation in, the neglect, and that the client's redress is an action for malpractice. (*Carroll, supra,* 32 Cal.3d at 898.)

To show "positive misconduct", and hence a violation of due process, a party seeking relief from default must show a total failure on the part of its counsel to represent it in the action, effectively abandoning it, and also affirmatively prove that it was relatively free from negligence in allowing counsel's conduct to persist. (*Carroll, supra,* 32 Cal.3d at 898.) California's practice of attributing counsel's conduct to a party, except in instances of positive misconduct or abandonment, fully comports with due process.

On the factual record before them, both the Trial Court and the California Court of Appeal found no positive misconduct [Appendix A to the Petition at page 9a: "... Armenta continued to represent Radix's interests throughout the litigation, however tardy or inept such

efforts may have been."] That factual determination does not pose any substantial federal issue which need be addressed by this Court.

VI.
CONCLUSION

Though Radix challenges the constitutionality of various California statutes relating to discovery and default prove-up procedure, Radix has failed to serve its Petition upon the Attorney General of the State of California as required under Rule 28(4)(c) of this Court's Rules.

Radix's invocation of the Court's jurisdiction on the basis that California discovery and default statutes allow the Trial Court to exercise discretion which deprived it of its constitutional right to due process under the Fourteenth Amendment was not a timely-raised issue in Radix's opening brief on appeal and therefore has not been preserved for presentation in this Petition. Moreover, the record is abundantly clear that the Trial Court gave Radix repeated opportunities to be heard, to conduct discovery and to present its case over the two and one-half year life of the action.

The California Court of Appeal has upheld the imposition of a (discovery) terminating sanction of the dismissal of Radix's pleadings with entry of Radix's default on McGriff's cross-complaint based upon Armenta's incompetent, though active, representation both prior to and after the entry of Radix's default.

Radix's potential liability to McGriff for compensatory damages and for punitive damages is expressly set forth in McGriff's cross-complaint to which Radix served its answer on April 29, 1986. The judgment awarded McGriff is fully supported by the numerous declarations of McGriff officers and employees attesting to over $50,000 in out-of-pocket damages as a result of Radix's wrongful detention of McGriff's goods.

In view of the foregoing, no relief to Radix is warranted. McGriff therefore respectfully requests that Radix's Petition be denied in its entirety.

Dated: December 8, 1989

Respectfully submitted,

GAIL A. REISMAN
(Counsel of Record)

KALISCH & FISHER
Attorneys for Respondent
McGriff Treading Company, Inc.
9606 Santa Monica Boulevard
Penthouse Suite
Beverly Hills, California 90210
(213) 274-6683